

STATE OF MICHIGAN  
COURT OF APPEALS

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CHRISTINE E. EVANS, Ph.D.,

Plaintiff-Appellant,

v

BOARD OF REGENTS OF THE UNIVERSITY  
OF MICHIGAN,

Defendant-Appellee.

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UNPUBLISHED

August 5, 2003

No. 238799

LC No. 00-001139-NO

Before: Neff, P.J. and Fort Hood and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting summary disposition to defendant on plaintiff's claim of sex discrimination under the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.* We affirm for the reasons set forth below.

I

Plaintiff was hired by defendant as a tenure-track assistant professor in the fall of 1993. In the fall of 1998, an ad hoc committee was formed to review plaintiff's work and make a recommendation to the executive committee regarding her qualification for tenure. The ad hoc committee, which served in an advisory role, recommended plaintiff for tenure. The executive committee voted five-to-one against granting tenure. At the same time, the executive committee also considered two other candidates for tenure, one male and the other female. Both of those candidates received unanimous votes in favor of tenure. Plaintiff unsuccessfully appealed the executive committee's decision to the college grievance review board. She then filed this action. Subsequently, defendant moved for summary disposition under MCR 2.116(C)(10), which the trial court granted.

This Court reviews a grant of a motion of summary disposition under MCR 2.116(C)(10) *de novo*. The trial court must view the evidence in the light most favorable to the nonmoving party and "may grant summary disposition under MCR 2.116(C)(10) only if there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law." *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001), citing *Smith v Globe Life Ins Co*, 460 Mich 446, 453; 597 NW2d 28 (1999).

Plaintiff claims to have presented evidence of both direct and indirect evidence of sex discrimination. As evidence of direct discrimination plaintiff provided two statements made by

executive committee members. One statement was made before her denial of tenure. This statement was made at a dinner party by one of the committee members who said to plaintiff's husband, "how can you live with such a controlling woman?" The second statement took place during tenure deliberations. One of the committee members remarked that plaintiff was "pushy." Plaintiff contends that the words "controlling" and "pushy" are simply alternative words for "assertive" and "aggressive," characteristics praised in men, but decried in women by the allegedly discriminatory executive committee members.

## II

Direct evidence of discrimination is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle*, *supra* at 462, quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999). Additionally, where the plaintiff can cite direct evidence of discrimination, the burden-shifting test enunciated by *McDonnell Douglas Corp v Green*, 411 US 792, 802-803; 93 S Ct 1817; 36 L Ed 2d 668 (1973) is not applicable. *United States v Wayne County Community College Dist*, 242 F Supp 2d 497, 508 (ED MI, 2003). The presentation of direct evidence is generally sufficient to submit the plaintiff's case to the jury. *Id.*

We concur with the trial court's finding that these statements do not constitute direct evidence of gender discrimination. In *Harrison v Olde Financial*, 225 Mich App 601, 610; 572 NW2d 679 (1997), quoting *Kresnak v Muskegon Heights*, 956 F Supp 1327, 1335 (WD Mich, 1997) (citations omitted), Justice Young, then Judge Young, held that "[d]irect evidence' has been defined in the Sixth Circuit Court of Appeals as evidence that, if believed, 'requires the conclusion that unlawful discrimination was at least a motivating factor.'" Also, statements by unrelated decision makers do not constitute direct evidence that unlawful discrimination was a determining or motivating factor in the employer's decision. *Id.* at 608 n 7; *Wells v New Cherokee Corp*, 58 F3d 233, 237-238 (CA 6, 1995).

Here, plaintiff has provided statements that on their face are gender neutral. While we are not unmindful of the fact that words can be used as a means to convey discriminatory intent, we find that the words "controlling" and "pushy" are merely statements of a perception of the plaintiff's character. These words, as perceptions of one's character, can be applied equally to men and women. Even considering these statements and words in the light most favorable to the plaintiff, we cannot conclude that they are sufficient to find they are evidence of direct discrimination. In the absence of direct evidence of discrimination, we must turn to the burden of proof analysis set forth in *McDonnell Douglas Corp*, *supra*, at 802-803.

## III

Sex discrimination claims involving indirect or circumstantial evidence under the ELCRA, MCL 37.2101 *et seq.*, are examined using the *McDonnell-Douglas* burden-shifting approach. Using the *McDonnell-Douglas* approach, plaintiff must first establish a prima facie case of discrimination. *Hazle*, *supra* at 463. To make a prima facie case, plaintiff must present evidence that: (1) she belongs to a protected class; (2) she suffered an adverse employment action; (3) she was qualified for the position; and (4) the job was given to someone else under circumstances giving rise to unlawful discrimination. *Id.* The facts that plaintiff belongs to a protected class and has suffered an adverse employment action are undisputed. The parties dispute whether plaintiff was qualified for tenure. Both parties provide substantial evidence

regarding qualification. This Court is in accord with the trial court in finding that, for purposes of summary disposition, plaintiff has shown a triable issue of fact that she was qualified for tenure. The fact that a group of chemistry department professors given the task to review and advise the executive committee regarding plaintiff's qualification for tenure concluded that she was qualified is sufficient to create an issue of fact for plaintiff's prima facie case for qualification. Also, plaintiff's letters of recommendation from her academic peers all recommended her for tenure.

The final prong in establishing a prima facie case requires plaintiff to show an issue of fact indicating that the decision was made under such circumstances that would give rise to unlawful discrimination. *Hazle, supra* at 463. Plaintiff notes the derogatory comments from executive committee members discussed above, the ad hoc committee decision, many favorable outside letters, and disparate treatment when compared to similarly-situated male candidates among other reasons as evidence of circumstances that would give rise to unlawful discrimination. Plaintiff's burden here is minimal - simply to show an issue of fact for a prima facie case. This Court again concludes in accord with the trial court that the proofs create an issue of fact on this fourth prong, and thus plaintiff has established a prima facie case.

Once plaintiff establishes a prima facie case, the burden shifts to defendant to provide a legitimate nondiscriminatory reason for denying plaintiff tenure to rebut the presumption of discrimination. *Id.* at 464. In determining whether a proffered reason is legitimate and nondiscriminatory, this Court must not analyze the "soundness" of the decision or whether it was "wise, shrewd, prudent, or competent." *Id.* at n 7, quoting *Town v Michigan Bell Telephone Co*, 455 Mich 688, 704; 568 NW2d 64 (1997). Instead, the focus is on whether the decision was "'lawful,' that is, one that is not motivated by a 'discriminatory animus.'" *Id.*, quoting *Town, supra* at 704 and citing *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 257; 101 S Ct 1089; 67 L Ed 2d 207 (1978).

Defendant provided the following six reasons to rebut the presumption of discrimination in denying tenure to plaintiff: (1) plaintiff gave a poor seminar; (2) her research lacked creativity; (3) her external review letters were insufficiently supportive; (4) her scholarship was inadequate; (5) she had done no seminal or ground-breaking research; and (6) her teaching was not stellar.

When a defendant provides a legitimate nondiscriminatory reason, the presumption of discrimination created by the prima facie case "drops away." *Hazle, supra* at 465. Then, to avoid summary disposition, the plaintiff must show that the defendant's proffered reasons are a mere pretext for sex discrimination. More specifically, the plaintiff must show that the evidence, when viewed in the plaintiff's favor, is "sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." *Id.*, citing *Lytle v Malady, (On Rehearing)*, 458 Mich 153, 176; 579 NW2d 906 (1998). At this point in the analysis, the inquiry "is exactly the same as the ultimate factual inquiry made by the jury: whether consideration of a protected characteristic was a motivating factor, namely, whether it made a difference in the contested employment decision." *Hazle, supra* at 466. "For purposes of a motion for summary disposition or directed verdict, a plaintiff need only create a question of material fact upon which reasonable minds could differ regarding whether discrimination was a motivating factor in the employer's decision." *Id.*

Plaintiff offers a list of nine separate items which she claims establishes that defendant's reasons for denying her tenure were a mere pretext for sex discrimination. Plaintiff argues that the trial court erred in its method of analysis by considering each item individually but not considering the nine items collectively. The trial court analyzed each item individually and then concluded that reviewing the facts in the "totality of the circumstances," there was not sufficient evidence of sex discrimination to survive defendant's motion for summary disposition. The trial court held that the factors were individual and unrelated. Hence, for the court to analyze them at all, it must have done so one at a time.

Plaintiff argues that the reasons set forth by defendant were a mere pretext to hide their discriminatory motive. Taken altogether, plaintiff argues that the evidence provided creates issues of material fact that would allow a reasonable trier of fact to find that sex discrimination was a motivating factor in the executive committee's decision to deny her tenure. We disagree. The trial court provided a lengthy and sound analysis of each of plaintiff's arguments of pretext and properly concluded that they fail both collectively and individually, to set forth a question of fact.

Lastly, plaintiff claims there has been historic under-representation of women as tenured members of the University Of Michigan Department Of Chemistry. Plaintiff has demonstrated that females are under-represented in the department; however, plaintiff has failed to demonstrate how this fact is evidence of gender discrimination or discriminatory motive aimed specifically at plaintiff. Additionally, as defendant points out, the executive committee unanimously granted tenure to another female professor at the same time plaintiff was denied tenure. Thus, plaintiff would have us hold that the under-representation of a protected group within an employer's organization, in and of itself, presents a question of material fact for the jury. We are not persuaded to make such a finding in this case.

Affirmed.

/s/ Janet T. Neff  
/s/ Karen M. Fort Hood  
/s/ Stephen L. Borrello